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NO. 84-1399

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ERNEST ALLEN,

Petitioner,

v.

CITY OF KINLOCH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Pursuant to the authority in Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the City of Kinloch, requests this to court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

OPINIONS BELOW

The opinion of the Eighth Circuit

Court of Appeals has not formalized its opinion.

STATEMENT OF THE CASE

The statement of the case as given by the petitioner should be disregarded by the Court, since it is a distortion of the facts and clearly was not used in evidence in the case at bar. The respondent shall give the true facts of the case by citing to the transcript and the lower courts findings to give the true facts of the case.

Petitioner, Ernest Allen, owned four trucks (Tr. 1-72) which he stored on property next to his home in the City of Kinloch (Tr. 1-75). On July 16, 1983, none of the petitioner's trucks stored on the lot had proper and complete state licenses (Tr 2-39, 2-81)

or city sticker registration (Tr. 2-39, 2-81). The latest registration on the vehicles were several years old (Tr. 2-39). The trucks were stored on an open and vacant lot (Tr. 1-75, 2-39, 2-60, 2-80), which was owned by the City of Kinloch (Tr. 2-163) and located next to property owned by Ernest Allen (Tr. 2-160). All of the trucks in question were derelict vehicles (Tr. 2-40, 2-60, 2-82).

On or about June 4, 1983 the Health Commissioner of the City of Kinloch, Mr. William Palmer (Tr. 2-19), personally gave notice to petitioner, Ernest Allen, at his home, (Tr. 2-21, 2-24) that the derelict trucks and trash near the trucks (Tr. 2-20) created a nuisance, a threat to health and safety (Tr. 2-24) and should be removed by him. Mr. Palmer had noticed

the trucks in violation of city ordinances on the property for at least four months (Tr. 2-30) prior to him giving the petitioner his first notice (Tr. 2-21, 2-30).

Shortly after the first notice for removal of the vehicles was posted, Mr. Palmer gave a second verbal notice to the petitioner that he must remove the vehicles (Tr. 2-24). Again on June 13, 1984 he gave notice to the petitioner (Tr. 2-23). After these repeated warnings of violation and continued non-compliance by the petitioner (Tr. 2-27), Mr. Palmer wrote a letter on June 28, 1983 to the police department (Tr. 2-26, Def. Ex. G.), advising them of the matter. (Def. Ex. H.) Mr. Palmer had no further involvement with the Petitioner, Ernest Allen, or the vehicles following the advisement to

the police (Tr. 2-31).

On or about July 9, 1983, a police officer of the City of Kinloch placed vehicle removal notices on the trucks on the vacant lot. (Tr. 2-50). The notices required the trucks, which were in violation of the law (the trucks did not have valid city or state licenses) to be removed within 24 hours. (Tr. 2-51, 2-69). Further, the notices stated that the owner's failure to remove the vehicles from the property could result in the City removing the vehicles (Tr. 2-52, 2-69).

The petitioner had testified that he had received the summons on July 16, 1983 pertaining to the violations, and was to appear in court on July 26, 1983 (Tr. 1-106).

On or about July 16, 1983, Officers Guybert Barnes and James Thomas of the

Kinloch Police Department (Tr. 2-37, 2-58) routinely checked the bulletin board to see if there were any outstanding car removal notices (Tr. 2-59). The officers found petitioner, Ernest Allen's trucks still in violation on city property (Tr. 2-38) after ample time had been given for the owner to remove them (Tr. 2-65). After investigation of the property and the actual viewing of the trucks in violation and with posted notices, the officers ordered and requested Ed Erp's Automotive Center to remove the vehicles in violation with the posted notices (Tr. 2-41, 2-62). The officers did not act under the express or implied authority of the Captain of Police (Tr. 2-109), the Mayor of Kinloch (Tr. 2-132), nor the Board of Aldermen (Tr. 166, 2-169).

Only those trucks in actual violation (Tr. 2-38, 2-60), on city property (Tr. 2-34; 2-60, 2-81, 2-89, 2-158, 2-159) and with notice of removal and violation (Tr. 2-38, 2-26) were towed on July 16, 1983. Vehicles not in actual violaton and without notice were not towed. (Tr. 2-68).

While in the process of towing the petitioner's vehicles, the petitioner appeared on the scene (Tr. 1-83) and blocked the exit passage-way with his automobile (Tr. 1-83). After numerous requests by the police officers to move his vehicle (Tr. 1-83, 2-63), the petitioner refused (Tr. 1-84). Subsequently, he was arrested for interfering with the duties of a police officer (Tr. 1-84). The trucks remained at Ed Erp's until the petitioner picked them up on or about

January 16, 1984 (tr. 1-94). The petitioner has testified that he suffered no loss of business during the trucks impoundment.

REASONS WHY WRIT SHOULD NOT BE ISSUED

The Court should not issue a Writ of Certiorari to settle a question of law that has already been decided by this Court and reaffirmed many times. The actions of the respondent, City of Kinloch were in accord with the Constitution of the United States and the law as set forth by the Supreme Court of the United States. The decision of the Eighth Circuit Court of Appeals was clearly in accord with the applicable law set down by this Court.

Petitioner, Allen, alleges the question presented to be

> "When a Police officer of a municipality, following city established procedures and

> without a search warrant, and without a pre-deprivation hearing, takes and removes motor vehicles of a citizen from his home, such removal not being first time, is the citizen barred from suing the municipality under 28 U.S.C. 1983 when he has a state remedy by reasons of its replevin laws (post-deprivation hearing), which returns the property and affords him limited damages for its return."

However, this is not the proper issue before the Court nor was it raised before any of the lower courts. Petitioner has greatly exaggerated the facts and nature of this case. Petitioner's framing of the question presented is in violation of Supreme Court Rule 21 in that the question is not expressed in the terms and circumstances of the case, but contains untrue statements. Moreover, it violates Rule 21 in that it is extremely argumentative and does not fairly set forth the issues of the

case.

Petitioner's question is in error and these errors shall be addressed seriatim: 1) "Allen presented little or no evidence regarding procedures the City normally afforded owners of towed vehicles; nor did he present rebuttal evidence when City officials testified that the City provided vehicle owners hearings in towing situations." (Eighth Circuit Court of Appeals Opinion, p. 2); 2) there was never an issue that the derelict trucks were removed from his property without a warrant; 3) there was no finding that the derelict trucks were removed from his property, in fact collaborated evidence showed that the open and vacant lot was City property (Tr. 2-160), 4) Allen was not barred from suit under 28 U.S.C. 1983, the 8th

Circuit held that "Allen failed to establish any violation of his constitutional rights; and 5) the damages are not limited under the Missouri replevin laws.

The only question that was before the lower courts and correctly answered by the Eighth Circuit Court of Appeals is "What process was due Allen". (Eighth Circuit Court opinion, p. 16).

At the outset it is important to note that the sole defendant in this action was the City of Kinloch, the individual police officer was not sued. In this regard, this Court has held in City of Oklahoma City v. Tuttle, _____ U.S., _____, 105 S.Ct. 2427, 2436 (1985), that a City policy may not be inferred from the single unconstitutional act of a police officer. To allow such an inference

would be to allow a:

> Section 1983 petitioner to establish municipal liability without submitting proof of a single action taken by a municipal policy maker. The * * * origins of Monell's "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decision makers.

Id. at 2435.

As stated by the Eighth Circuit, Allen did not present any evidence that the action taken was City policy. In fact he failed to rebut the City's evidence that vehicle owners are provided a hearing in towing situations. Therefore, the petitioner failed to meet his burden of proof as to the "policy or custom" of the municipality being unconstitutional, as required by Monell v. Department of

Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978), thus the decision of the Eighth Circuit should not be examined further.

Although the Eighth Circuit could have reversed the lower court's judgment on the basis of petitioner's failure to meet his burden of showing the City of Kinloch's "policy or custom" was unconstitutional, the Court went further to hold that the act irregardless of policy was not unconstitutional. The Eighth Circuit's reasoning is sound and in line with holdings of The Supreme Court of the United States and the holdings of other Circuits.

The question of "what process is due" has been answered many times by this Court. It is a question that has been answered generally and

specifically on a variety of fact patterns. It is perhaps the most answered questioned by this Court. The answer given has been consistently the same.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319 (1976). The court in Matthews held that in determining the type of hearing required, there must be a consideration of three distinct factors: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards, and (3) the government's interest,

including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

If in fact an employee did act beyond his scope of power there was no violation of procedural due process. It appears settled that municipalities authorizing towing of illegally parked cars are not required by the constitution to establish pre-deprivation notice and hearing procedures. Breath v. Cronvich, 729 F.2d 1006 (5th Cir. 1984); Sutton v. City of Milwaukee, 672 F.2d 644 (7th Cir. 1982). Moreover, Missouri has a state remedy of post-deprivation hearings by way of a replevin suit to persons who have suffered a tortious loss at the hands of the state. Rule 99.01 of the Missouri Rules of Civil

Procedure, as amended 1983. Such procedures would fully compensate petitioner for his property loss and are sufficient to satisfy the requirements of due process. This Court has reviewed this procedure in Hudson v. Palmer, 104 S.Ct. 3194 (1984) the Court held among other things that: an unauthorized intentional deprivation of property by the state did not constitute violation of the due process clause because meaningful post deprivation remedies for the loss of property were available under state law. Also in Parratt v. Taylor, 451 U.S. 527 (1980), the respondent brought an action in federal district court under 42 U.S.C. Section 1983 against prison officials to recover the value of hobby materials, claiming that petitioners had negligently lost the

materials and thereby deprived, respondent of property without due process of law in violation of the Fourteenth Amendment. The Court held that respondent did not state a claim for relief under 42 U.S.C. Section 1983. The Court pronounced that: (a) in any section 1983 action the initial inquiry must focus on whether the two essential elements to a section 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States; (b) secondly, if respondent has been deprived of property under the color of state law, he has not sufficiently alleged a violation of the

Due Process Clause of the Fourteenth Amendment since the deprivation did not occur as a result of some established state procedure. More importantly, the Court held that respondent could have fully been compensated for such loss, under the state's tort claims procedure which provides a remedy to persons who have suffered a tortious loss at the hands of the state, but as in the present case, the respondent in Parratt failed to use such procedure.

In Parratt the Court reasoned that where a loss of property is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure the state cannot predict when the loss will occur. Under the circumstances, the court observed:

> It is difficult to conceive of how the City could provide a meaningful hearing before

> the deprivation takes place. The loss of property, although attributable to the state as action under "color of law" is in almost all cases beyond the control of the state. Indeed in most cases it is not only impracticable, but impossible to provide a meaningful hearing before the deprivation.

Nevertheless, nothing in the Fourteenth Amendment protects against all deprivations of life, liberty, or property by the state. The Fourteenth Amendment protects only against deprivations without due process of law. The decisions in Parratt and Hudson held that where a random and unauthorized act by a state employee results in a tortious taking of private property, due process is satisfied if state tort law provides a meaningful post-deprivation remedy.

In Missouri, a person claiming the right to possession of personal

property wrongfully detained by another may bring an action in replevin. Rule 99.01, Missouri Rules of Civil Procedure (1983). If the court determines the petitioner in such an action is entitled to possession of the property, a judgment issues for the return of the property (at the prevailing party's option), and for damages assessed for the taking, detention or injury. Rule 99.12, Missouri Rules of Civil Procedure (1983). There is no reason why petitioner could not have obtained adequate relief for the taking of his trucks in a replevin action. Hudson v. Palmer, 104 S.Ct. 3194 (1984), (fact that Section 1983 petitioner might recover less in state tort action does not mean tort remedy is inadequate).

In fact as noted by the Eighth

Circuit, the petitioner, Allen, was afforded the opportunity to be heard in two ways. First, the petitioner was given a removal notice and court summons to appear in court on "July 26, 1983" (as noted by the court there is no indication that petitioner appeared or sought to appear in court on that date). Secondly, petitioner could have obtained adequate state relief by action of replevin in the Missouri courts. Ruel 99.01, Missouri Rules of Civil Procedure (1983).

In summary, a Writ of Certiorari should not be granted in this case due to 1) petitioner's failure to frame a proper question before this Court, 2) petitioner's failure to prove any action taken against him was done as a "policy or custom" of the respondent, City of Kinloch, 3) petitioner was

granted "due process" in that he had the opportunity to be heard in a meaningful time and place in two separate ways (a) by appearing July 26, 1983 in the respondent's court and (b) by bringing a suit of replevin in the courts of Missouri and 4) the decision of the Eighth Circuit Court of Appeals is clearly in line with the decisions of this Court and is similar to the holdings of the other circuits.

CONCLUSION

For the reasons heretofore stated above, the respondent, City of Kinloch requests this court to deny the petitioner's Writ of Certiorari, and that the opinion and order of the Court of Appeals of the Eighth Circuit be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lloyd J. Jordan, counsel of record for the City of Kinloch, Respondent, hereby certify that on the 11th day of October, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on Louis S. Czech, 7912 Bonhomme, Suite 404, Clayton, Missouri 63105 mailed first class, postage prepaid.

BY Lloyd J. Jordan
LLOYD J. JORDAN